

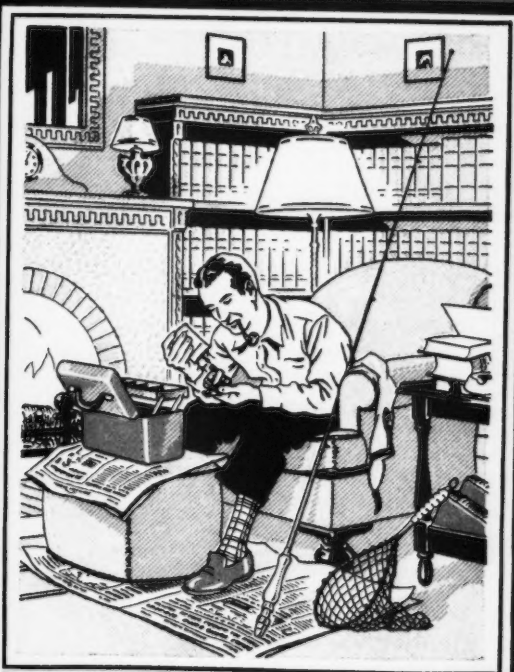
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VOL. 46

APRIL * 1941

NO. 5

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Mr. McKinney, a native of Illinois and of remote Scotch ancestry, was educated at Monmouth College (A.M., L.L.D.) and at North Western University Law School (L.L.B.). He is a member of the Bars of Illinois, New York and California. His home is in San Mateo, California.



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The Court of Criminal Appeal in England

Engraving from a painting by Arthur Clay



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THE ARGUMENT OF AN APPEAL

By JOHN W. DAVIS

Lecture delivered before the Association of the Bar of the City of New York, October 22, 1940, under the auspices of the Committee on Post-Admission Legal Education; Mr. Justice Shientag, Chairman, presiding.

IF A lecture on the well-worn subject assigned to me is to be given in this series, no one knows better than the Chairman of your Committee on Post-Admission Legal Education that he and not I should be the person to give it. This is true in the first place because of the fact that in his lecture on Summary Judgment he has given the perfect example of what these lectures ought to be—informative, scholarly, helpful—and has set a standard which it is unfair to ask others to rival. And in the second place a discourse on the argument of an appeal would come with superior force from a Judge who is in his judicial person the target and the trier of the argument than from a random archer like myself. Or, supposing fishes had the gift of speech, who would listen to a fisherman's weary discourse on fly-casting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach. For after all it is the fish that the angler is after and all his recidive learning is but the hopeful means to that end.

I hope I may not be charged with levity or disrespect in adopting this piscatorial figure. I do not suggest any analogies between our reverent masters on the Bench and the finny tribe. God forbid! Let such conceits tempt the less respectful. Yet it is true, is it not, that in the argument of an appeal the advocate is angling, consciously and deliberately angling,

for the judicial mind. Whatever tends to attract judicial favor to the advocate's claim is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other. Why otherwise have argument at all?

I pause for definition. Argument, of course, may be written as well as oral, and under our modern American practice written argument has certainly become the most extended if not always the weightier of the two. As our Colleague, Joseph H. Choate, Jr., recently remarked, "we have now reached the point where we file our arguments in writing and deliver our briefs orally." Yet it was not always so and in certain jurisdictions it is not so today. In England, for instance, where many, perhaps most, cases are decided as soon as the argument is closed, counsel are not expected to speak with one strabismic eye upon the clock and the other on the court.

I recall that I once visited the chambers of the Privy Council in London hoping to hear a Canadian friend argue a Canadian appeal. When I arrived his adversary had the floor and was laboriously reading to the Court from the open volumes, page by page and line by line, the reported cases on which he relied. Said I to the Clerk, "How long has he been speaking and when will So-and-So come on?" "He has now been speaking," said the Clerk, "for six consecutive days and I doubt if he concludes today." I picked up my hat and sadly departed, realizing into what an alien atmosphere I had wandered.

In the old days, when not only

courts but lawyers and litigants are reputed to have had more time at their disposal, similar feats were performed at the American Bar. It has been stated, for instance, that the arguments of Webster, Luther Martin and their colleagues in *McCulloch v. Maryland*, consumed six days, while in the *Gerard will* case Webster, Horace Binney and others, for ten whole days assailed the listening ears of the Court.

Those days have gone forever; and partly because of the increased tempo of our times, partly because of the increase of work in our appellate tribunals, the argument of an appeal, whether by voice or pen, is hedged about today by strict limitations of time and an increasing effort to provoke an economy of space. The rules of nearly every court give notice that there is a limit to what the judicial ear or the judicial eye is prepared to absorb. Sometimes the judges plead, sometimes they deplore, sometimes they command. The bar is continuously besought to speak with an eye on the clock and to write with a cramped pen.

Observing this duty of condensation and selection I propose tonight to direct my remarks primarily to the oral argument. I begin after the briefs have all been filed; timely filed of course, for in this matter lawyers are never, hardly ever, belated. I shall assume that these briefs are models of brevity, are properly indexed, and march with orderly logic from point to point; not too little nor yet too much on any topic, even though in a painful last moment of proof-reading many an appealing paragraph has been offered as a reluctant sacrifice on the altar of condensation.

I assume also that the briefs are not overlarded with long quotations from the reported opinions, no matter how pat they seem; nor overcrowded with citations designed it would seem to

certify to the industry of the brief-maker rather than to fortify the argument. A horrible example of this latter fault crossed my desk within the month in a brief which, in addition to many statutes and text writers, cited by volume and page no less than 304 decided cases; a number calculated to discourage if not to disgust the most industrious judge.

I assume further that they are not defaced by *supras* or *infras* or by a multiplicity of footnotes which, save in the rare case where they are needed to elucidate the text, do nothing but distract the attention of the reader and interrupt the flow of reasoning. And I remark in passing that these are no more laudable in a judge's opinion than they are in a lawyer's brief.

I assume that there is not a pestilent "and/or" to be found in the brief from cover to cover; or if there is, that the court, jealous of our mother-tongue, will stamp upon the base intruder.

And finally I assume as of course that there has been no cheap effort to use variety in type to supply the emphasis that well-constructed sentences should furnish for themselves. It may be taken as axiomatic that even Judges, when they are so disposed, can read understandingly; and I should think that where the pages of a brief begin conversationally in small pica, nudge the reader's elbow with repeated italics, rise to a higher pitch with whole paragraphs of the text—not mere headings—in black letter, and finally shout in full capitals (and such have been observed), the Judge might well consider that what was a well-intentioned effort to attract his attention was in reality a reflection on his intelligence.

So it is with our briefs brought to this state of approximate perfection that we approach our oral argument. Much has been said pro and con as to the utility of this particular exer-

cise. The most frequently early days of the spent in waste; admitted proving nately, crasy with that tri mony, a contrary

Says with all the act themselves can att in coun where I openeth standing and right this pious times moves i ders to lecture dence declares th bly assum had heard ished fa been on takes, en us in sp is pour bar." C ord to ity of a ment in gainsaid time of of exten tain the possible able m wheat f most ju ways pr is inspir

cise. The appellate court which I most frequently encountered in my early days at the Bar made no secret of the fact that it regarded the time spent in hearing cases as a sheer waste; and the announcement "Submitted on briefs" always won an approving nod from the bench. Fortunately, I think, that was an idiosyncrasy which has passed away even in that tribunal. There is much testimony, ancient and modern, for the contrary view.

Says Lord Coke, "No man alone with all his uttermost labors, nor all the actors in them, themselves by themselves out of a court of justice, can attain unto a right decision; nor in court without solemn argument where I am persuaded Almighty God openeth and enlargeth the understanding of those desirous of justice and right." Agreeing as we must with this pious sentiment, we lawyers sometimes think nevertheless that "God moves in a mysterious way, his wonders to perform." Judge Dillon in his lecture on the Laws and Jurisprudence of England and America, declares that as a judge he felt reasonably assured of his judgment where he had heard counsel and a very diminished faith where the cause had not been orally argued, for says he "Mistakes, errors, fallacies and flaws elude us in spite of ourselves unless the case is pounded and hammered at the bar." Chief Justice Hughes is on record to the effect that "The desirability of a full exposition by oral argument in the highest court is not to be gainsaid. It is a great saving of the time of the court in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff." With all this most judges, I think, will agree, always provided that the oral argument is inspired as it should be with a sin-

gle and sincere desire to be helpful to the court.

Professing no special fitness for the task, I have ventured accordingly to frame a decalogue by which such arguments should be governed. There is no mystical significance in the number ten, although it has respectable precedent; and those who think the number short and who wish to add to the roll when I have finished, have my full permission to do so.

At the head of the list I place, where it belongs, the cardinal rule of all, namely:—

(1) Change places, in your imagination of course, with the Court.

Courts of appeal are not filled by Demigods. Some members are learned, some less so. Some are keen and perspicacious, some have more plodding minds. In short, they are men and lawyers much like the rest of us. That they are honest, impartial, ready and eager to reach a correct conclusion must always be taken for granted. You may rightfully expect and you do expect nothing but fair treatment at their hands.

Yet those who sit in solemn array before you, whatever their merit, know nothing whatever of the controversy that brings you to them, and are not stimulated to interest in it by any feeling of friendship or dislike to anyone concerned. They are not moved as perhaps an advocate may be by any hope of reward or fear of punishment. They are simply being called upon for action in their appointed sphere. They are anxiously waiting to be supplied with what Mr. Justice Holmes called the "implements of decision." These by your presence you profess yourself ready to furnish. If the places were reversed and you sat where they do, think what it is you would want first to know about the case. How and in what order would

you want the story told? How would you want the skein unraveled? What would make easier your approach to the true solution? These are questions the advocate must unsparingly put to himself. This is what I mean by changing places with the court.

If you happen to know the mental habits of any particular judge, so much the better. To adapt yourself to his methods of reasoning is not artful, it is simply elementary psychology; as is also the maxim not to tire or irritate the mind you are seeking to persuade. And may I say in passing that there is no surer way to irritate the mind of any listener than to speak in so low a voice or with such indistinct articulation or in so monotonous a tone as to make the mere effort at hearing an unnecessary burden.

I proceed to Rule 2—

(2) State first the nature of the case and briefly its prior history.

Every Appellate Court has passing before it a long procession of cases that come from manifold and diverse fields of the law and human experience. Why not tell the Court at the outset to which of these fields its attention is about to be called? If the case involves the construction of a will, the settlement of a partnership, a constitutional question or whatever it may be, the judge is able as soon as the general topic is mentioned to call to his aid, consciously or unconsciously, his general knowledge and experience with that particular subject. It brings what is to follow into immediate focus. And then for the greater ease of the court in listening it is well to give at once the history of the case in so far as it bears on the court's jurisdiction. And sometimes there may be, I am not sure, a certain curiosity to know just whose judicial work it is that the court is called upon to

review. For judges, like other men, judge each other as well as the law.

Next in order—

(3) State the facts.

If I were disposed to violate the rule I have previously announced against emphasis by typography, I would certainly employ at this point the largest capital type. For it cannot be too often emphasized that in an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case far more than half argued. Yet how many advocates fail to realize that the ignorance of the court concerning the facts in the case is complete, even where their knowledge of the law may adequately satisfy the proverbial presumption. The court wants above all things to learn what are the facts which give rise to the call upon its energies; for in many, probably in most, cases when the facts are clear there is no great trouble about the law. *Ex facto oritur jus*, and no court ever forgets it.

No more courteous judge ever sat on any bench than the late Chief Justice White, but I shall never forget a remark which he addressed to a distinguished lawyer, now dead, who was presenting an appeal from an order of the Interstate Commerce Commission. He had plunged headlong into a discussion of the powers of the Commission, and after he had talked for some twenty-five minutes, the Chief Justice leaned over and said in his blindest tone, "Now, Mr. So-and-So, won't you please tell us what this case is about. We could follow you so much better."

Of course there are statements and statements. No two men probably would adopt an identical method of approach. Uniformity is impossible, probably undesirable. Safe guides,

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however, are to be found in the three C's—chronology, candor and clarity: Chronology, because that is the natural way of telling any story, stringing the events on the chain of time just as all human life itself proceeds; candor, the telling of the worst as well as the best, since the court has the right to expect it, and since any lack of candor, real or apparent, will wholly destroy the most careful argument; and clarity, because that is the supreme virtue in any effort to communicate thought from man to man. It admits of no substitute. There is a sentence of Daniel Webster's which should be written on the walls of every law school, courtroom and law office: "The power of clear statement" said he "is the great power at the bar." Purple passages can never supply its absence. And of course I must add that no statement of the facts can be considered as complete unless it has been so framed and delivered as to show forth the essential merit, in justice and in right, of your client's cause.

(4) State next the applicable rules of law on which you rely.

If the statement of facts has been properly done the mind of the court will already have sensed the legal questions at issue, indeed they may have been hinted at as you proceed. These may be so elementary and well established that a mere allusion to them is sufficient. On the other hand, they may lie in the field of divided opinion where it is necessary to expound them at greater length and to dwell on the underlying reasons that support one or the other view. It may be that in these days of what is apparently waning health on the part of our old friend *Stare Decisis*, one can rely less than heretofore upon the assertion that the case at bar is governed by such-and-such a case, volume and page. Even the shadow of a long

succession of governing cases may not be adequate shelter. In any event the advocate must be prepared to meet any challenge to the doctrine of the cases on which he relies and to support it by original reasoning. Barren citation is a broken reed. What virtue it retains can be left for the brief.

(5) Always "go for the jugular vein."

I do not know from what source I quote that phrase but it is of course familiar. Rufus Choate's expression was "the hub of the case." More often than not there is in every case a cardinal point around which lesser points revolve like planets around the sun, or even as dead moons around a planet; a central fortress which if strongly held will make the loss of all the outworks immaterial. The temptation is always present to "let no guilty point escape" in the hope that if one hook breaks another may hold. Yielding to this temptation is pardonable perhaps in a brief, of which the court may read as much or as little as it chooses. There minor points can be inserted to form "a moat defensive to a house." But there is no time and rarely any occasion in oral argument for such diversions.

I think in this connection of one of the greatest lawyers, and probably the greatest case winner of our day, the late John G. Johnson of Philadelphia. He was a man of commanding physical presence and of an intellect equally robust. Before appellate courts he addressed himself customarily to but a single point, often speaking for not more than twenty minutes but with compelling force. When he had concluded it was difficult for his adversary to persuade the court that there was anything else worthy to be considered. This is the quintessence of the advocate's art.

(6) Rejoice when the court asks questions.

And again I say unto you, rejoice! If the question does nothing more it gives you assurance that the court is not comatose and that you have awakened at least a vestigial interest. Moreover a question affords you your only chance to penetrate the mind of the court, unless you are an expert in face reading, and to dispel a doubt as soon as it arises. This you should be able to do if you know your case and have a sound position. If the question warrants a negative answer, do not fence with it but respond with a bold *thwertutnay*—which for the benefit of the illiterate I may explain as a term used in ancient pleading to signify a downright No. While if the answer is in the affirmative or calls for a concession the court will be equally gratified to have the matter promptly disposed of. If you value your argumentative life do not evade or shuffle or postpone, no matter how embarrassing the question may be or how much it interrupts the thread of your argument. Nothing I should think would be more irritating to an inquiring court than to have refuge taken in the familiar evasion "I am coming to that" and then to have the argument end with the promise unfulfilled. If you are really coming to it indicate what your answer will be when it is reached and never, never sit down until it is made.

Do not get into your head the idea that there is a deliberate design on the part of any judge to embarrass counsel by questions. His mind is seeking help, that is all, although it may well be that he calls for help before he really needs it. You remember Bacon's admonition on the subject in his *Essay on Judicature*:

"It is no grace to a judge" he says, "first to find that which he might have heard in due time from the bar, or to

show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions though pertinent."

On the other hand, Chief Justice Denison of the Supreme Court of Colorado puts the matter thus:

"A perfect argument would need no interruption and a perfect Judge would never interrupt it; but we are not perfect. If the argument . . . discusses the truth of the first chapter of Genesis when the controlling issue is the constitutionality of a Tennessee statute it ought to be interrupted. . . . It is the function of the Court to decide the case and to decide it properly. . . . The Judge knows where his doubts lie, at which point he wishes to be enlightened; it is he whose mind at last must be made up, no one can do it for him, and he must take his own course of thought to accomplish it. Then he must sometimes interrupt."

Judges are sometimes more annoyed by each other's questions than counsel, I have observed. I remember a former Justice of the Supreme Court much given to interrogation, who engaged counsel in a long colloquy of question and answer at the very threshold of his argument. In a stage whisper audible within the bar Chief Justice White was heard to moan "I want to hear the argument." "So do I, damn him" growled his neighbor, Justice Holmes. Yet questions fairly put and frankly answered give to oral argument a vitality and spice that nothing else will supply.

(7) Read sparingly and only from necessity.

The eye is the window of the mind, and the speaker does not live who can long hold the attention of any audience without looking it in the face. There is something about a sheet of paper interposed between speaker and listener that walls off the mind of the latter as if it were boiler-plate. It obstructs the passage of thought as the lead plate bars the X-rays. I real-

ize that I am taking just this risk at present, but this is not a speech or an argument, only, God save the mark, a lecture.

Of course where the case turns upon the language of a statute or the terms of a written instrument it is necessary that it should be read, always, if possible, with a copy in the hands of the court so that the eye of the court may supplement its ear. But the reading of lengthy extracts from reported cases or long excerpts from the testimony can only be described as a sheer waste of time. With this every appellate court of my acquaintance agrees. A sentence here or a sentence there, perhaps, if sufficiently pertinent and pithy, but not I beg of you print by the paragraph or page.

There is a cognate fault of which most of us from time to time are guilty. This arises when we are seeking to cite or distinguish other cases bearing on our claims and are tempted into a tedious recital of the facts in the cited case, not uncommonly prefaced by the somewhat awkward phrase "That was a case where," etc. Now the human mind is a pawky thing and must be held to its work and it is little wonder after three or four or half a dozen such recitals that not only are the recited facts forgotten but those in the case at bar become blurred and confused. What the advocate needs most of all is that his facts and his alone should stand out stark, simple, unique, clear.

(8) Avoid personalities.

This is a hard saying, especially when one's feelings are ruffled by a lower court or by opposing counsel, but none the less it is worthy of all acceptance, both in oral argument and in brief. I am not speaking merely of the laws of courtesy that must always govern an honorable profession, but rather of the sheer in-

utility of personalities as a method of argument in a judicial forum. Nor am I excluding proper comment on things that deserve reprobation. I am thinking psychologically again. It is all a question of keeping the mind of the court on the issues in hand without distraction from without.

One who criticizes unfairly or harshly the action of a lower court runs the risk of offending the quite understandable *esprit de corps* of the judicial body. Rhetorical denunciation of opposing litigants or witnesses may arouse a measure of sympathy for the persons so denounced. While controversies between counsel impose on the court the wholly unnecessary burden and annoyance of preserving order and maintaining the decorum of its proceedings. Such things can irritate; they can never persuade.

(9) Know your record from cover to cover.

This commandment might properly have headed the list for it is the *sine qua non* of all effective argument. You have now reached a point in the litigation where you can no longer hope to supply the want of preparation by lucky accidents or mental agility. You will encounter no more unexpected surprises. You have your last chance to win for your client. It is clear therefore that the field tactics of the trial table will no longer serve and the time has come for major strategy based upon an accurate knowledge of all that has occurred. At any moment you may be called on to correct some misstatement of your adversary and at any moment you may confront a question from the court which, if you are able to answer by an apt reference to the record or with a firm reliance on a well-furnished memory, will increase the confidence with which the court will listen to what else you may have to say. Many an argument otherwise admira-

ble has been destroyed because of counsel's inability to make just such a response.

(10) Sit down.

This is the tenth and last commandment. In preparing for argument you will no doubt have made an outline carefully measured by the time at your command. The notes of it which you should have jotted down lie before you on the reading desk. When you have run through this outline and are satisfied that the court has fully grasped your contentions, what else is there left for you to do? You must be vain indeed to hope that by further speaking you can dragoon the court into a prompt decision in your favor. The mere fact that you have an allotted time of one hour more or less does not constitute a contract with the court to listen for that length of time. On the contrary, when you round out your argument and sit down before your time has expired, a benevolent smile overspreads the faces on the bench and a sigh of relief and gratification arises from your brethren at the bar who have been impatiently waiting for the moment when the angel might again trouble the waters of the healing pool and permit them to step in. Earn these exhibitions of gratitude therefore whenever you decently can, and

leave the rest to Zeus and his colleagues, that is to say, to the judges on high Olympus.

Before I obey this admonition myself, may I say, Mr. Chairman, how painfully conscious I am that I have offered nothing new concerning the subject in hand. I have not even been able to cover old thoughts with new varnish. How could I have hoped to do so? The process of appeal from one tribunal to another is very old in the history of human justice. No matter in what form it is carried on the essentials of an appeal are always the same, and there is nothing very new to be said about it. The need for an appellate process arises from the innate realization of mankind that the human intellect and human justice are frail at their best. It is necessary therefore to measure one man's mind against another in order to purge the final result, so far as may be, of all passion, prejudice or infirmity. It is the effort to realize the maximum of justice in human relations; and to keep firm and stable the foundations on which all ordered society rests. There is no field of nobler usefulness for the lawyer. For him, who in the splendid words of Chancellor D'Aguesseau, belongs to an order "as old as the magistracy, as noble as virtue, as necessary as justice."

RESPECT FOR JUDICIAL DECISIONS

WHAT security have you for your property, for your reputation, and for your personal rights, if the courts are not upheld, and their decisions respected when once firmly rendered by the highest tribunal known to the Constitution? I do not choose, therefore, to go into any argument with Mr. Lincoln in reviewing the various decisions which the Supreme Court has made, either upon the Dred Scott case, or any other.

—STEPHEN DOUGLAS.

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AN INCIDENT IN THE CAREER OF STEPHEN J. FIELD

*BY PERRY BERTRAM
OF THE LOS ANGELES BAR

BEFORE being elevated to the Supreme Court of the United States, where he served for many years, Stephen J. Field practiced law in California during one of the State's most colorful and exciting periods—the years immediately following the discovery of gold.

Mr. Field, a young attorney, who had been in partnership with his brother in the practice of law in New York, arrived in San Francisco late in December of 1849, with but ten dollars in his pocket. An expressman charged him seven dollars for his two trunks. He set forth to get some breakfast, and although he ordered the cheapest breakfast he could get, it cost him two dollars, leaving him with but a single dollar to his name.

He described his first moments in California in these words: "A solitary dollar was, therefore, all the money in the world I had left, but I was in no respect despondent over my financial condition. . . . There was something exhilarating and exciting in the atmosphere which made everybody cheerful and buoyant. As I walked along the streets, I met a great many persons I had known in New York, and they all seemed to be in the highest spirits. Everyone in greeting me, said, 'It is a glorious country,' or, 'Isn't it a glorious country?' or, 'Did you ever see a more glorious country?' or something to that effect. In every case the word 'glorious' was sure to come out. . . . I had not been out many hours that

morning before I caught the infection, and though I had but a single dollar in my pocket and no business whatever, and did not know where I was to get the next meal, I found myself saying to everybody I met, 'It is a glorious country.'"

Young Mr. Field did, however, have a note for \$400.00 which his brother in New York had intrusted to him for collection, and in the course of the morning's ramble, the flaring office sign of Colonel Stevenson, the debtor, attracted his attention. Let him tell you in his own words of his interview with the Colonel:

"Of course I immediately entered the office to see the Colonel. He had known me very well in New York, and was apparently delighted to see me, for he gave me a most cordial greeting. After some inquiries about friends in New York, he commenced talking about the country. 'Ah,' he continued, 'it is a glorious country. I have made two hundred thousand dollars.' This was more than I could stand. I had already given him a long shake of the hand, but I could not resist the impulse to shake his hand again, thinking all the time of my financial condition. So I seized his hand again and shook it vigorously, assuring him that I was delighted to hear of his good luck. We talked over the matter, and in my enthusiasm I shook his hand a third time, expressing my satisfaction at his good fortune. We passed a long time together, he dilating all the while upon the fine country it was in which to make money. At length I pulled out the note and presented

* This interesting incident was related on the Bar Association's radio program by Mr. Bertram.

it to him. I shall never forget the sudden change, from wreaths of smiles to an elongation of physiognomy, expressive of mingled surprise and disgust, which came over his features on seeing that note. He took it in his hands and examined it carefully; he turned it over and looked at its back, and then at its face again, and then, as it were, at both sides at once. At last he said in a sharp tone, 'That's my signature,' and began to calculate the interest; that ascertained, he paid me the full amount due. . . . If it had not been for this lucky incident, I should have been penniless before night."

With his financial independence assured, at least for the next week or ten days, the cost of living being what it was in those days, Mr. Field took the next river steamer out of San Francisco to go as far as he could by river toward the most populous mining region in the state. At his destination he found a tent city of somewhere between five hundred and a thousand persons. He resolved to make this his home. Within an hour of his arrival he became a person of consequence by subscribing to town lots to the amount of \$16,250—and this, with but \$20.00 left to him of Colonel Stevenson's money!

It is only fair to say that such subscriptions were not considered binding contracts, but rather expressions of confidence in the town's future.

The evening following his arrival there was a social gathering in honor of the erection of the first frame house in the settlement. The enterprising young attorney seized the occasion to urge the organization of a town government. His remarks met with favor, and next morning his proposals were carried into execution at a public meeting. In the exciting election which followed, Mr. Field was chosen Alcalde of the new

town, which, the inhabitants at a later meeting, proud of the almost unique distinction of the residence there of a respectable American woman, named, in her honor, Marysville.

Not long afterwards, having earned the respect and admiration of the community, Mr. Field was nominated for the lower house of the state legislature. His campaign involved considerable traveling, since his district comprised several thousand square miles, chiefly rugged mountains.

One morning, in the course of his journeyings, he was riding along a winding road in the mountains on his way to the next little mining community, when he spied in the distance a group of men and faintly heard a voice or two raised in excitement.

His interest aroused at this diversion, he spurred his horse and trotted to the scene of the activity. There, across the road from a wayside saloon, he found a lynch jury trying a man on the charge of stealing gold dust—one of the most heinous of offenses in a new mining community. After watching the proceedings for a while, he became impressed with the appearance of the prisoner, and found himself unconsciously taking his side and believing him innocent. Knowing that in the swift justice of those days, a trial by a lynch jury meant a conviction, and a conviction a hanging, he groped for a plan to save the man from the certain fate which faced him.

He finally decided on a course of action. During a temporary lull in the proceedings, he spoke:

"Gentlemen, my name is Stephen J. Field. I am a candidate for the legislature of this glorious state of ours, and I would be honored if you would join me across the way in a glass of refreshment."

In those days, such an invitation was seldom declined, and the foreman of the jury, nothing loath to quench his thirst, announced, "At this time, the court will take a brief recess," and led the way into the saloon across the road.

In the ensuing hustle and bustle and loud talk and coarse jokes which invariably accompanied the setting up of a round of drinks for the house, Mr. Field unobtrusively slipped outside the door and took the occasion to speak to the prisoner who had been left outside. More and more he became impressed with the character of the man. After several moments, he returned to the bar, not the slightest doubt in his mind that the accused was telling the truth in professing his innocence.

"Another round of drinks," he proposed, "and cigars to everyone—the best you have, Mr. Barkeeper, it's not often that you have a candidate for the legislature among you."

As the barkeeper refilled the glasses and the men were lighting up their cigars, drawing those first few satisfying puffs, those soul-comforting puffs, which only those to whom a good cigar is a real treat can appreciate, Mr. Field went from one little group to another, passing a word with this man, and returning a joke to that one, all the time studying each one and evaluating his character.

Then singling out the most benevolent looking man among the jury, he opened conversation with him:

"Well, my friend, how long have you been in California?"

"Let's see now, next Sunday it'll be—eight months."

"Where are you from?"

"Pennsylvania, sir."

"A beautiful state. Your family back there?"

"My mother, God bless her, and my sister and her husband."

A wave of homesickness swept over the juror, and his eyes began to glisten at the memories evoked by the interest which this candidate for the legislature was taking in him and his family.

Mr. Field paused a moment, then looking the man straight in the eye said, "Tell me, sir, what is the case against your prisoner? He too may have a mother and sister in the East, thinking of him as your mother and sister do of you, and wondering when he will come back. For God's sake, man, remember this."

His voice trembling and choked with emotion, the heart of the good man responded, "I will remember it, and thank you, sir."

A third glass all round, and with an ally from among the jurors, the young advocate thought it safe to speak to the jury about the trial.

"Gentlemen, you and I are proud of this glorious state of ours. California does have properly organized courts of law to protect you and me from criminals. Your prisoner out there may or may not be a criminal. He appears to be without any friends, and from what I heard of his trial, there was no one to speak in his defense. I appeal to you, gentlemen, as men of large hearts, to think how you would feel if you were accused of crime, and had no counsel and no friends to speak in your defense, and you realized you could not prove your innocence. If that man is innocent and you hang him, his blood will be a stain on your hearts and your conscience until your dying day. I ask you to send him to Marysville, where he will be tried according to law, where he will have the fair trial that each one of you would want if you were accused of stealing."

As he stopped speaking, the whispers which had begun to murmur during his last few words exploded into

a din of loud talk and deafening arguments, each one trying to make himself heard above the rest. The men were divided about equally. One group was for immediately finishing the trial and hanging the defendant on the spot. The other, their hearts softened by the words of the candidate, considerably assisted by the drinks and the mellow cigars, was for following Field's suggestion and giving the man a legal trial at Marysville.

At the moment when the dispute between the two factions was at its loudest, by a fortunate coincidence, a teamster bound for Marysville drove up to the saloon and entered. As soon as it was known that he was driving to the town, the man to whom Field had spoken earlier boomed out, forcing the room to silence:

"Pardners, this is no accident. It was intended that this wagon should arrive here at this time to take the defendant to Marysville for trial. You cannot go against fate."

This turned the tide. The jury were prevailed upon to put the prisoner in charge of the teamster, who was bound under oath to deliver him to the sheriff. Mr. Field himself added the sanction of a fifty dollar gold coin as bond to assure his safe delivery.

The following week, upon his return to Marysville, Mr. Field hastened to the sheriff to inquire about the defendant. The trial, he was informed, was set for the following Friday. The sheriff admitted him to the jail house to see the prisoner. Upon learning that he did not have an attorney, young Field immediately volunteered his services.

"But, Mr. Field," protested the young man, "I have no money. I can't pay you to defend me."

"Forget it. I think you're innocent, and I'd be a poor excuse for an attorney, if I didn't do my best to help an innocent man."

The morning of the trial arrived. As Field walked across the street from his office to the court house, he observed just entering the building most of the men who made up the lynch jury which had released the defendant at his insistence. However, holding themselves a little bit apart from the rest were the four men who to the very last that day had remained unmoved by his pleas, and were insistent upon proceeding with the contemplated hanging.

A tougher, meaner, more determined group of miners, than these four, Mr. Field had never seen. With a gulp, he checked the brace of revolvers which he wore, loosened them in their holsters, and entered the court house.

Throughout the trial he felt the eyes of those four men burning little holes in his back. It was with the greatest effort of will on his part that he refrained from casting apprehensive glances over his shoulder. Each moment he expected to hear a shot, and feel the burning of a bullet in his back. Steeling himself against the nerve-wracking situation, the brilliant young attorney excelled himself in the conduct of the trial, and proved without a shadow of a doubt that the defendant was innocent. The jury returned a verdict of acquittal and the accused was set free.

With the profuse and heartfelt gratitude of his client expressed to him with tears in his eyes, the successful attorney turned to leave the court room. He hesitated a moment at the door and looked up and down the street. There, sure enough, a short distance up the street were the four miners. At Field's appearance, they exchanged significant glances, slyly nudged each other, and nodded in his direction.

Never one to dodge a situation that had to be met, he set forth across the street toward his office, ready for any

emergency, inwardly seething with excitement, yet outwardly cool and calm.

He reached the door of his office and entered. The men had made no threatening move.

No sooner, however, was he seated behind his desk, when a loud rap sounded on the door. Before he could speak, in trudged the four miners, their huge frames filling the small office, their unsmiling faces sinister and foreboding. Forming a rough semi-circle in front of his desk, they glared at him. The attorney's glance traveled from one to the other. He found no comfort in their appearance, and as his eye slowly came to rest on the leader, who from the moment of his entrance had kept his right hand

concealed in his pocket, he muttered a quick prayer under his breath.

"Well, gentlemen?" he inquired.

"How much did Joe pay you to get him off?" growled the leader.

"Why, nothing, nothing at all. You see, he didn't . . ."

"We thought so," interrupted the spokesman. "Here, take this!" And slowly drawing his hand out of his pocket he placed on the desk before the astonished Mr. Field a sack of gold dust, representing a small fortune, and continued, "It won't do you no good to ask for any more. You did a good job in proving that he didn't do the stealing, but this is all the fee you're gonna get out of us."

And with that they turned and left the office.—BAR BULLETIN, Nov., 1940.

DANIEL WEBSTER IN PRESCOTT CASE

" . . . *The fate of the respondent is in your hands. It is for you now to say, whether, from the law and the facts as they have appeared before you, you will proceed to disgrace and disfranchise him. If your duty calls on you to convict him, let justice be done, and convict him; but, I adjure you, let it be a clear, undoubted case. Let it be so for his sake, for you are robbing him of that for which with all your high powers, you can yield him no compensation; let it be so for your own sakes, for the responsibility of this day's judgment is one which you must carry with you through life. For myself, I am willing here to relinquish the character of an advocate, and to express opinions by which I am prepared to be bound as a citizen and a man. And I say upon my honor and conscience, that I see not how, with the law and constitution for your guides, you can pronounce the respondent guilty. I declare that I have seen no case of wilful and corrupt official misconduct, set forth according to the requisitions of the constitution, and proved according to the common rules of evidence. I see many things imprudent and ill-judged; many things that I could wish had been otherwise; but corruption and crime I do not see.*"

SQUIRE SEDAM

His Open Air Court, Bastille and Remarkable Sentence of Banishment

BY MITCHELL DAWSON

IN THE currently shown film of "The Westerner" the famous Roy Bean, who did business at Vinegarroon and later at Langtry, Texas, under the sign "Justice of the Peace—Whiskey, Wine and Beer—The Law West of the Pecos," has at last come into his own as a legend for the millions. It took a long time for Hollywood to discover him. He was first introduced to the public many years ago in the pages of the *Saturday Evening Post*, and later Ruell McDaniel put him into a book.

Judge Bean's exploits recall the story of an earlier despot of the J. P. bench—Squire Henry F. Sedam of Sedamsville, Ohio, who ruled over the old Storrs township in the environs of Cincinnati from 1824 to 1870 with an iron hand.

Squire Sedam was almost the perfect embodiment of the lay ideal of a judge. He had ample whiskers and a benevolent mien, and along with the whiskers, he wore a black stringtie and a shirt with ruffles which stood out like white wattles beneath his chin. Heavy-set, with a broad-brimmed hat and stout hickory cane, he dispensed justice, as he said, "by dispensing with law." He was popularly called "Chief Justice of Storrs," but he was really something of an hereditary monarch, for his father, Cornelius R. Sedam, had reigned over

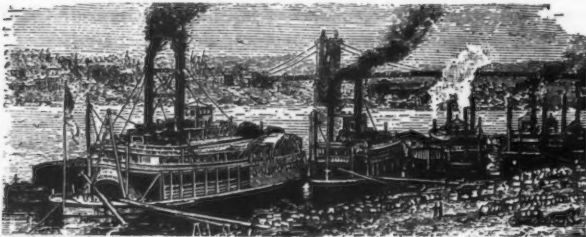
Storrs township for thirty years before him and was perhaps the first American example of "government by the judiciary."

Squire Henry F. Sedam was all the law the township had for more than forty years and apparently all it needed, for no one ever tried to depose him. He sentenced malefactors and settled quarrels with a finality from which none appealed. He ordered brawlers to strip and fight each other to a knockout under the eyes of his constables who stood by with switches to see the punishment carried out. A dispute between "litigious cusses" he called a "chancery case" because he didn't give either party a chance to overreach the other.

On summer days Squire Sedam held court under the apple trees in his orchard. It looked like a picnic grove with litigants, witnesses and counsel, sitting around at tables, eating fruit or melons furnished by the Squire while they waited their turn to be heard. Despotism though he was, the Squire consistently refrained from making money out of his office. Quite unlike Roy Bean in this respect, he never collected any costs.

In winter and whenever the weather was bad the Squire held court on the second floor of a two-story brick building he had put up in his orchard. Over the door hung a sign "Court Room of Stores." The interior was decorated with mammoth-tusks, stone axes, war relics, maps, busts and portraits.

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a peculiar way of directing verdicts. He kept a large bomb-shell, brought from some battlefield of the Mexican War, on the floor in front of his bench. When asked why he kept it there, the Squire replied. "Oh, I keep it for my juries. I always want them to bring in the right verdict and bring it in quick. So when I close my charge, I say, 'I'm going to leave you locked up here in the court-room to consult. Now you see that bomb-shell? There is a fuse going to it from outside. If you don't agree on a verdict in five minutes, I will fire the fuse.' I have no trouble with my juries at all."

The Squire also had effective ways of dealing with recalcitrant defendants of all sorts. The drunk and disorderly quickly made acquaintance with the Squire's private jail which was a circular store-room in front of a wine cellar built into the side of a hill. It had great iron doors, fastened with a padlock as big as a half peck measure, and above the doors were painted a sword and pistols with the word "Bastille." Prisoners who did time in this dank dungeon stayed out of the township ever after.

His remedy for wife-beaters is unique in the annals of American justice. After due financial provision was made for the offender's family, the Squire would banish him to Kentucky for thirty or sixty days. The sentence was carried out by the constable who rowed the culprit across the Ohio River in a skiff. If he came back before his term of banishment expired, the Squire's "boys" would switch him soundly and dump him in the Bastille.

One Sunday morning an old gentle-

man appeared at Squire Sedam's door with the seat of his trousers ripped off by a ferocious dog. The Squire sent for the dog's owner, who was dressed in his best suit for church. "Take off those pants!" roared the Squire, "and swap them with the plaintiff." Which the church-goer did under threat of being thrown into jail.

When the stevedores from an Ohio River steamboat, which had docked at Sedamsville, came to him complaining that they hadn't been paid, the Squire entered judgment in their

favor, and while the captain went off to find surety for an appeal bond, the Squire and his constable hurried down to the boat with a hatchet and a pair of steelyards, chopped open several barrels and weighed out enough pork and flour for each of the crew to satisfy his claim.

This rough and ready justice reminds one of the observations of Mrs. Frances Trollope, mother of Anthony, who came to Cincinnati in 1828 to establish a dry-

goods shop and after it failed retrieved her fortunes by writing about the "Domestic Manners of the Americans." She wrote, with malice of course—

"One of the spectacles that produced the greatest astonishment on us all was the republican simplicity of the courts of justice. We had heard that the judges indulged themselves on the bench in those extraordinary attitudes which, doubtless, some peculiarity of the American formation leads them to find most comfortable. Of this we were determined to judge for ourselves, and accordingly entered the court when it was in full business, with three judges on the bench.



SQUIRE SEDAM

CASE AND COMMENT

The annexed sketch will better describe what we saw than anything I can write."

Just what sort of a court Mrs. Trollope visited is hard to figure out but she seems to have caught the flavor of the frontier courts where book learning and formalities played a minor part. Squire Sedam had little use for legal fol-de-rols. A young man who had been elected J. P. in a neighboring township came to him one day to get advice about the sort of law books he should read.

"I wouldn't advise you to read any law books at all," said the Squire. "My experience is that whenever a county magistrate undertakes to study law, he makes a damn fool of himself. You are elected as a justice of the peace. Now all you have to do is use your common sense and best judgment in trying to do justice and keep the peace among your neighbors, and if they want *law*, let them go to the higher court and be plucked to their heart's content."

—Chicago Bar Record, Dec. 1940.



SOLEMNITY OF JUSTICE

From "Domestic Manners of the Americans" by Frances Trollope

THE LANGUAGE OF THE LAW

WHAT the law has said I say. In all things else I am silent. I have no organ but for her words. This, if it be not ingenious, I am sure is safe.



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UNTIL SHE STARVED TO DEATH, SIR

Contributor: A. B. Taylor, Whittier, California.

I WAS the attorney for the defendant, writes a lawyer, in a suit brought to recover the sum of \$30.00 in the County Court of Chase County, Nebraska, to recover on a note which was given by the defendant in payment of the purchase price for a feed grinder which had been sold to the defendant, a farmer, and was to be attached to his windmill to grind corn for his cows.

The defendant refused to pay the note at maturity for the reason that the grinder was not as represented by the plaintiff.

At the trial several of the defendant's neighbors were called as witnesses for the defendant and stated that the grinder ground the feed so slow, that it would not pay for the wear and tear of the windmill.

A certain Irish neighbor of the defendant was sworn and testified in support of defendant and stated that the grinder ground so slow that it was practically worthless.

The plaintiff's attorney then proceeded to cross-examine the Irish neighbor and directed it principally to just how fast the grinder would grind the feed, and asked him the following questions:

Question: "Yes, but how fast would it grind? Tell the Court and the Jury

how much it would grind in an hour or in a day."

Answer: "I can't Mr. Attorney, for I did not time it or measure the feed, so I cannot say exactly how fast it would grind it, but it was awfully slow."

Q. "Well you surely can tell us something about how much it would grind, can't you?"

A. "It is very hard to estimate for it ground so fearfully slow."

Q. "Yes, I know, but you surely are intelligent enough to tell this Court and Jury something about how much it would grind, can't you?"

A. "Well Mr. Attorney, the best that I can say is, that an old cow could eat it as fast as it grinds it."

Q. "Yes, I see, but how long could she keep it up?"

A. "Faith and be jabbers, Mr. Attorney, until she starved to death, sir."

A NEW USE FOR CASE AND COMMENT

Submitted by Clinton R. Dorn, Des Moines, Iowa.

CLIENTS of mine, writes a subscriber, recently purchased a new home. Their landlady became very wroth because they planned to move, although they had no lease for any definite time.

I am now in receipt of a letter from

Twenty-one

the landlady's attorney reading as follows:

"Mrs. S----- claims rent for 13 days against C----- and wife at \$25.00 per month which amounts to \$10.83. She states that on account of the dogs being kept in the basement, the basement and house are infested with a swarm of fleas which she has been fighting with spraying fluid. The dogs, also, tore up the linoleum in the bathroom. However, if we can settle for the rent that is due, and \$5.00 for the linoleum, we will forget the expense and inconvenience occasioned by the fleas."

To this letter I have replied as follows:

"Your letter about fleas reminds me of a touching treatise on "Fleas" by Mark Twain or Josh Billings or another of their type, in which it was conceded that all dogs have fleas, but the question was: "How many fleas should a dog have?"

The conclusion reached was that a dog *should* have a *reasonable* number of fleas, to keep him active.

As to the dog having damaged the linoleum, I suggest that the dog's testimony be taken on the question, as otherwise it might be difficult to prove that the dog did it. You speak of more than one dog. Which dog's testimony do you want? If either dog did it, was it more than *reasonable* wear and tear?

You remember that the courts have held that every dog is entitled to one bite. Otherwise how could the owner know that he was harboring a dangerous dog so as to make the owner liable? In this instance, had the dog ever taken a bite on the linoleum before this, so as to make the C----- liable? And which one of the C-----s owned the dog?

As to the rent, I assume that the C-----s pay their honest debts. I do know that they feel that they were treated very shabbily just because they bought a home for themselves,

and they did not like the treatment they received.

They have not consulted me about this matter, but I am sending them a copy of your letter and this reply, and I am sure they will do the right thing.

The enclosed clipping from CASE AND COMMENT shows that your client is not the only landlady who became miffed at a tenant and went out of bounds in what she demanded the tenant pay her."

I enclosed with my letter a clipping from CASE AND COMMENT of November, 1939, about the landlady miffed at her tenant who sent him an itemized statement and added to the bill: "Will charge you \$25.00 for calling me a bitch ----- \$25.00.

Most sincerely,



THE EVOLUTION OF A VESTED RIGHT

By William B. Rubin of the Milwaukee Bar.

WE have learned how adverse possession may ripen into a seisin in fee, a privilege into a grant, an invitation into a license, and now you shall learn how an act of generosity or goodwill is held as a vested right by its recipient.

What I am about to relate is founded on fact, and again proves that truth may be stranger than fiction. Here, you have summed up in a brief occurrence, a development of a vested right not only in social security, old age pensions and their bid for increases, but in the generosity and kindness of others.

In the barber shop where I have my tonsorial embellishments, a few days before Christmas, a brother lawyer in a vein of frivolity and facetiousness, took me to task for failing to take care of the Porter; "Christmas is coming around the corner, and you, Bill, ought to do something for him. Buy

him a goose for Christmas," he shouted loudly in the presence of a full barbershop, seeking to embarrass me. I turned to the jokester lawyer and as I saw the Porter's eyes rotate with an accelerated speed and riding his hopes high and handsome on one of Santa's reindeer, replied with a degree of calmness, "I'll buy the porter a goose for Christmas on one condition, namely, that you buy him a big duck." The jokester who was somewhat conservative in his tips, caught in his own trap, and not wanting to appear petty in the eyes of the Porter, and the listening barbershop crowd, with cheeks red with abashment, turned to me and with a voice somewhat drooping, said, "Yes, I'll buy him a duck," and told the Porter where he was to get the duck.

In compliance with my promise to buy the porter a goose, I went across the street and left an order with the butcher to get him a goose, and that he would call for it on Monday, Christmas being on Wednesday.

It seemed that the local goose market was exhausted, and the butcher unable to provide him with a goose, exercised his commercial initiative and prepared for him a 6½ pound duck, believing that the porter would be only too happy to get that duck.

About 4:00 o'clock on that Monday afternoon, while I was busily engaged in a conference with a client, I was interrupted by the telephone and the conversation was thus:

The Porter: "Hello, Mr. Rubin? Dis is the pohter of the barber shop."

Mr. Rubin: "Yes, what do you want?"

The Porter: "Mr. Rubin, you done promised me a goose."

Mr. Rubin: "Yes, I did."

The Porter: "But the butcher he say he got no goose, he got de duck."

Mr. Rubin: "Well, you better then take the duck."

The Porter: "But Mr. Rubin, you done promised me a goose."

Mr. Rubin: "Well, under the circumstances, you had better take the duck."

The Porter: "But Mr. Rubin, you done promised me a goose, and now I gotta eat duck two days in succession. Dat ain't fair, you done promised me a goose."

There you have the law of evolution in human acquisitiveness. What was an act of Christmas spirit on my part, perhaps by accident, was by the porter promptly insisted as a vested right in him.

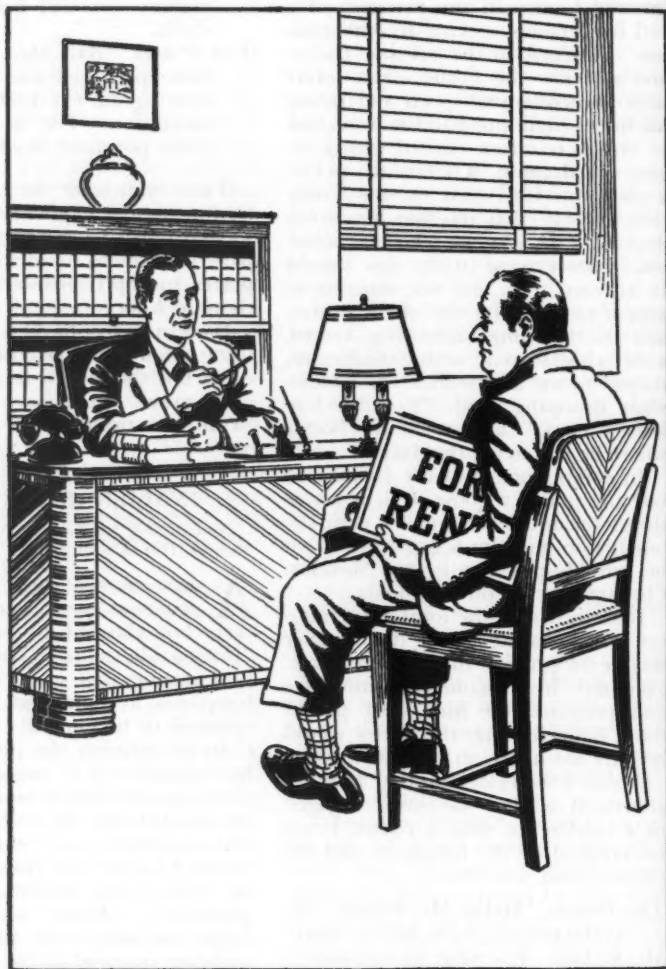
Darwin may have known something about the "Origin of the Species," but the law in its development often grows out of such incidents as "You done promised me a goose."

INALIENABLE RIGHTS'

Contributed by George Whitfield Lane, Morgan Hill, California.

A MAN charged with "treading the primrose path," admitted the facts but claimed to be within his "inalienable rights." The Court freed him stating that as he was without happiness at home he had gone in "pursuit of happiness" elsewhere.

In his opinion the judge said that he realized that it was a liberal construction and that it would doubtless be assailed on the technicality that this inalienable right was not in terms in the Constitution itself but only so set forth in the Declaration of Independence. "Being an *inalienable right*," he said, "there was no need of its being repeated in the Constitution. The Declaration of Independence is the very essential foundation on which the Constitution rests and is properly resorted to as a guide to the meaning of the Constitution. The Court takes judicial notice that conditions are not what they used to be, these are not the horse and buggy days.



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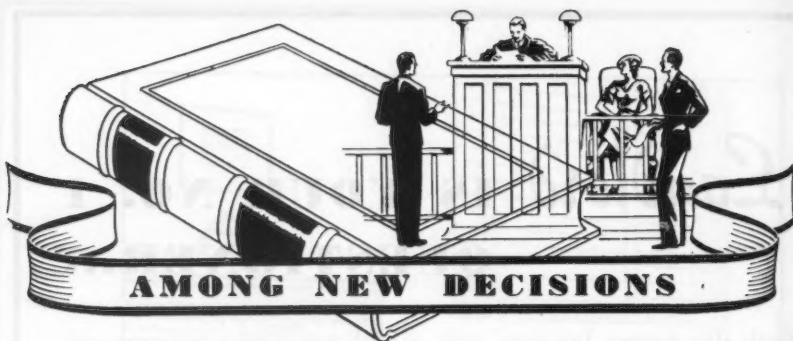
Landlord IS YOUR NO. 1 QUESTIONER...

Each day more lawyers are asked questions concerning rights and duties of landlord and tenant than any other part of law. Unfortunately, these questions are not always productive of large fees. Indeed, there is perhaps more free advice given on this subject than on all others. Yet the lawyer's reputation depends on his ability to give sound advice regardless of the amount involved.

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AMERICAN JURISPRUDENCE



Attorneys — *compensation for defending prosecution of pauper.* In *Knox County Council v. State*, — Ind —, 29 NE (2d) 405, 130 ALR 1427, it was held that to require an attorney to defend a criminal prosecution for a pauper defendant without receiving any compensation for his services is in conflict with a constitutional provision that "no man's particular services shall be demanded without just compensation."

Annotation: Compensation by public of attorneys for services under appointment by court in defending indigent person charged with crime. 130 ALR 1439.

Automobiles — *parking regulations.* In *Rhodes v. City of Raleigh*, 217 NC 627, 9 SE (2d) 389, 130 ALR 311, it was held that the powers conferred by statute on municipalities to regulate the use of, and traffic upon, public streets, include the power to adopt reasonable regulations with respect to the parking of automobiles in the street.

Annotation: Validity of automobile parking ordinances or regulations. 130 ALR 316.

Carriers — *conclusiveness of bill of lading between carrier and transferee.* In *Chesapeake & Ohio R. R. Co. v. State Nat. Bank*, 280 Ky 444, 133 SW (2d) 511, 283 Ky 443, 141 SW (2d) 869, 130 ALR 1306, it was held that

the quality of negotiability is conferred by implication on order bills of lading by the Federal Bill of Lading Act, thereby changing as to order bills the rule that no liability is imposed upon a carrier, even in favor of an innocent purchaser for value of such a bill, by reason of the issuance by its employees of a bill of lading when no goods have been in fact received.

Annotation: Right of carrier as against transferee of bill of lading issued for an interstate shipment since Federal Bill of Lading Act, to deny receipt of goods. 130 ALR 1315.

Commerce — *import duties as to state taxation of livestock.* In *Tres Ritos Ranch Co. v. Abbott*, — NM —, 105 P (2d) 1070, 130 ALR 963, it was held that cattle brought into the United States on the hoof from a foreign country and sold to the owner of a cattle ranch, where they are grazed and fattened for market, lose their character as imports, so as to become subject to state taxation, notwithstanding the fact that the ranch on which they have been kept has been designated for customs purposes as a "bonded warehouse" so as to afford a basis for the contention that so long as imports are retained in customs custody in their original form they are not subject to state taxation, particularly where the imported cattle mingle on the open range with cattle

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Annotation: State taxation of livestock as affected by Federal constitutional or statutory provisions relating to imports, exports, or interstate commerce. 130 ALR 969.

Conditional Sale — breach of warranty. In Pullen v. Johnson, — SD —, 290 NW 488, 130 ALR 747, it was held that a buyer sued for the purchase price of goods under a conditional sales contract need not, in order to take advantage of a breach of warranty, seek rescission of the contract or interpose a counterclaim for damages, but may set up the breach of warranty as a defense to the suit against him, where the statute (Uniform Sales Act, § 11 (2) provides that where the property in the goods has not passed, the buyer may treat the fulfilment by the seller of his obligation to furnish the goods as warranted as a condition of the buyer's obligation to pay therefor.

Annotation: Rights of parties to conditional sale as affected by breach of warranty. 130 ALR 753.

Conditional Sale — statute as to statement of conditions and terms. In Standard Acceptance Corp. v. Connor, 127 Conn 199, 15 A(2d) 314, 130 ALR 720, it was held that a statutory requirement that a contract of conditional sale, to be valid as to third persons, shall state "all conditions of such sale" is not met by a contract stating that payments of a specified amount and number shall begin at a date nearly a year prior to the date of the contract, obviously inserted through inadvertence, where the contract does not in any way disclose the date at which payments are to be completed.

Annotation: Construction and application of statute requiring conditional sale contract or record thereof

to describe all conditions or terms of the sale. 130 ALR 725.

Constitutional Law — equal protection as to anti-trust act. In Tigner v. State, 310 US 141, 84 L ed 1124, 60 S Ct 879, 130 ALR 1321, it was held that the exemption of agricultural activities from the operation of the criminal provisions of a state anti-trust act does not render the act unconstitutional as a denial of the equal protection of the laws. (Connolly v. Union Sewer Pipe Co. 184 US 540, 46 L ed 679, 22 S Ct 431, overruled.)

Annotation: Legality of combination among farmers. 130 ALR 1326.

Constitutional Law — free speech and picketing. In A. F. of L. v. Bain, Congress of Industrial Organizations et al., v. Same, Respts. — Or —, 106 P (2d) 544, 130 ALR 1278, it was held that the constitutional right of free speech is unreasonably restricted by a statute which permits picketing in or near an employer's premises only where the disputants stand in proximate relation of employer and a majority of his employees, and the dispute directly concerns matters directly pertaining to wages, hours, or working conditions of the employee of the particular employer directly involved in such controversy.

Annotation: Validity of statute or ordinance against picketing. 130 ALR 1303.

Constitutional Law — statutes preventing discrimination in wage payment. In General Motors Corp. v. Read, 294 Mich 558, 293 NW 751, 130 ALR 429, it was held that the use of the words "similarly" and "formerly" in a statute making it an offense for an employer of both male and female employees in the manufacture or production of any article to discriminate in the payment of wages as between sexes, or to pay any female "engaged in the manufacture or produc-

tion of any article of like value, workmanship, and production a less wage . . . than is being paid to males similarly employed in such manufacture, production, or in any employment formerly performed by males," does not render the statute so uncertain and ambiguous that its attempted enforcement would be a denial of due process of law.

Annotation: Validity, construction, and application of statute designed to prevent discrimination between male and female employees as regards wages or other conditions of work. 130 ALR 436.

Contempt — *refusal in replevin to surrender property*. In *Universal Credit Co. v. Antonsen*, 374 Ill 194, 29 NE (2d) 96, 130 ALR 626, it was held that refusal of defendant in a replevin action to turn over to the officer to whom the writ is directed the property described therein is not punishable as contempt of court, since the writ merely commands the officer to take the property without commanding the defendant to surrender it.

Annotation: Failure or refusal to surrender possession or disclose whereabouts of property in replevin as contempt. 130 ALR 632.

Contracts — *public policy as to divorce*. In *Howard v. Adams*, — Cal (2d) —, 105 P(2d) 971, 130 ALR 1003, it was held that an aunt's agreement with her niece, who had determined to sue for a divorce for which valid grounds existed, that if the niece, to avoid local publicity which the aunt thought might be damaging to her own social and business connections, would seek a divorce in another state, notwithstanding it was unlikely that she could obtain alimony there, the aunt would support the niece for the rest of her life and take care of and educate her children is not against public policy as one tending to facilitate the dissolution of a

marriage, where it does not appear that the divorce was collusive.

Annotation: Contract between husband or wife and third person as contrary to public policy and invalid because tending to encourage divorce. 130 ALR 1008.

Corporations — *authority to employ attorney for*. In *Kelly v. Citizens Finance Co.* — Mass —, 28 NE (2d) 1005, 130 ALR 890, it was held that the authority incident to the offices of president and treasurer of a corporation does not extend to the employment of counsel for the corporation in a stockholder's suit seeking appointment of a receiver and the dissolution of the corporation.

Annotation: Authority to employ attorney for corporation. 130 ALR 894.

Corporations — *eligibility as directors*. In *Re Fleetwood Bank*, 283 NY 157, 27 NE (2d) 974, 130 ALR 152, it was held that the election as directors of persons who were stockholders in fact is not rendered invalid by the fact that they were not, at the time, stockholders of record, where they became such before taking office, and the applicable statute, while requiring directors to be citizens and residents of the state "at the time of their election," does not refer to any particular time in its requirement that every director must be a stockholder of record.

Annotation: Eligibility as corporate director of one who was not stockholder in fact, or not stockholder of record, at time of election, but who afterwards became such. 130 ALR 156.

Counties — *payment of attorney's fees in defending suits against officials*. In *Board of Com. of Natrona County v. Casper Nat. Bank*, — Wyo —, 105 P(2d) 578, 130 ALR 727, it was held that certificates of indebtedness issued by a county to counsel employed by

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members of the board of county commissioners to defend taxpayers' suits brought against them for an injunction against the making of alleged illegal payments to county officers and employees are valid where, although in such suits it was asserted that the county was not sued but that the suit was only against the individual defendants, there was no allegation or showing that defendants as individuals had a personal interest in such suits.

Annotation: Payment of attorneys' services in defending action brought against officials. 130 ALR 736.

Courts — *State jurisdiction under Fair Labor Standards Act.* In *Hart v. Gregory*, — NC —, 10 SE (2d) 644, 130 ALR 265, it was held that a state court has jurisdiction of a suit by an employee to recover unpaid minimum wages and overtime compensation under the Fair Labor Standards Act (29 USC §§ 201 et seq.).

Annotation: Judicial questions regarding Federal Fair Labor Standards Act (Wage and Hours Act) and state acts in conformity therewith. 130 ALR 272.

Elections — *refusal of official to file certificate of nomination.* In *State of Washington v. Reeves*, — Wash —, 106 P (2d) 729, 130 ALR 1465, it was held that the secretary of state is not justified in refusing to file a certificate of nomination of certain persons as candidates for public office on the ground that they are nominees of a party whose avowed principle, not disclosed by the certificate of nomination, is, as a matter of common knowledge, the overthrow of the government by violence, so that to accept the certificate of nomination would be contrary to public policy and a vain and useless thing because such candidates could not, except by fraud, take the oath of office if elected, where the applicable

statute contemplates a refusal to file only if the certificate of nomination is defective or the law specifying the manner in which nominations may be made has not been complied with.

Annotation: Political principles or affiliations as ground for refusal of government officials to file certificate of nomination or take other steps necessary to representation of party or candidate upon official ticket. 130 ALR 1471.

Eminent Domain — *slum clearance a public purpose.* In *Housing Authority of City of Dallas v. Higginbotham*, — Tex —, 143 SW (2d) 79, 130 ALR 1053, it was held that the elimination of slum conditions and the providing of safe and sanitary dwelling accommodations for persons of low income constitute a "public use" for the consummation of which the state may constitutionally grant to a housing authority the right to exercise the power of eminent domain, especially where the legislature has expressly declared such use to be a public one.

Annotation: Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions (slum clearance). 130 ALR 1069.

Equitable Conversion — *reconversion.* In *Strickler v. Byrd*, 171 Va 347, 198 SE 918, 130 ALR 1373, it was held that real property treated as personality under the doctrine of equitable conversion may be the subject in equity of a reconversion into real property, where the party having the beneficial interest elects to take the property in its original state as real property.

Annotation: Doctrine of equitable reconversion. 130 ALR 1379.

Evidence — *burden of proof as to market price or value of goods.* In *Haughey v. Belmont Quadrangle*



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Drilling Corp. 284 NY 136, 29 NE (2d) 649, 130 ALR 1331, it was held that in an action by a seller against a buyer for failure to take goods the title to which remains in the seller, in which the measure of recovery is the difference between the purchase price and the market price of the goods, it may not be presumed that the goods are without value and that there is no available market for them; and in the absence of evidence of such facts or of other facts which would justify use of a different measure of loss, a verdict for plaintiff for the amount of the purchase price must be set aside.

Annotation: Presumption and burden of proof as to market price or value of goods in action by seller against buyer who refuses to accept goods. 130 ALR 1336.

Evidence — conviction or acquittal as evidence in civil case. In *Wolff v. Employers Fire Ins. Co.* 282 Ky 824, 140 SW (2d) 640, 130 ALR 682, it was held that a judgment of conviction of crime or a judgment of acquittal are each admissible circumstantial facts available to the party in whose favor they are, in a later civil action involving the same facts as were determined in the criminal prosecution.

Annotation: Conviction or acquittal as evidence of facts on which it was based in civil action. 130 ALR 690.

Evidence — declarations of injured person. In *Collins v. Equitable Life Ins. Co.* — W Va —, 8 SE (2d) 825, 130 ALR 287, it was held that when appearances indicate that one has suffered an injury, a statement by him, if spontaneous and reasonably coincident with, and explanatory of, the occurrence, may be regarded as part of it and be competent evidence under the doctrine of *res gestae*.

Annotation: Admissibility of statements by one who claimed to have met with an accident, as evidence of fact of accident. 130 ALR 291.

Evidence — earning capacity of injured person. In *Wiley v. Moyer*, — Pa —, 15 A (2d) 145, 130 ALR 161, it was held that as bearing upon the damages recoverable in a personal injury action for permanent impairment of earning capacity of one employed at the time of the accident in taking care of lanterns on a WPA street improvement project, testimony as to plaintiff's earnings as a coal miner in an employment which terminated nine years before is without evidential value, particularly where he apparently had no intention of resuming that occupation.

Annotation: Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in action for personal injury or death. 130 ALR 164.

Evidence — hearsay in declarations to physician. In *Meaney v. U. S. A.* 112 F (2d) 538, 130 ALR 973, it was held that the hearsay rule does not preclude proof of declarations made by declarant to his attending physician with a view to obtaining treatment, as to the history of his ailment.

Annotation: Admissibility of statement by injured or diseased person to physician while latter is treating him or examining him to qualify himself as a witness. 130 ALR 977.

Evidence — indictment and pleading as to exception in statute. In *Sullivan v. Ward*, — Mass —, 24 NE (2d) 672, 130 ALR 437, it was held that where a duty or obligation or crime is defined by statute and an exception is made in the enacting clause or incorporated into the general clause descriptive of the duty or obligation or crime, the party pleading must allege and prove that his adversary is not within the exception; but if the exception is in a subsequent separate or distinct clause or statute,

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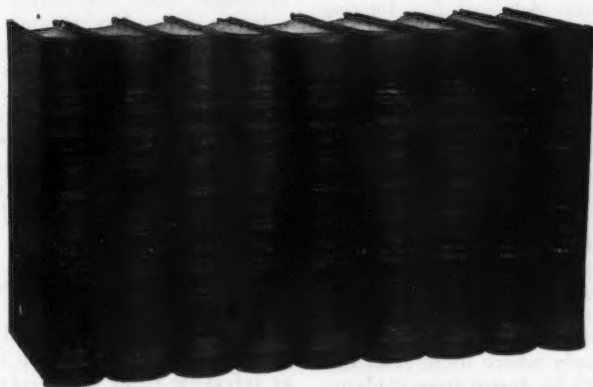
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then the party relying on such exception must allege and prove it.

Annotation: Burden of allegation and proof in civil cases as regards exception in statute. 130 ALR 440.

Evidence — mitigation of damages in libel action. In *Theodore v. Daily Mirror*, 282 NY 345, 26 NE (2d) 286, 130 ALR 853, it was held that the existence of unpaid judgments against the plaintiff in a libel action based on an imputation of unfaithfulness to his public trust in his office as a member of the legislature, for office rent and merchandise, for money lent and for work and services, may not be shown for the purpose of mitigating damages, although plaintiff in testifying has taken credit to himself for social service work and for membership in several professional and fraternal organizations.

Annotation: Admissibility, for purpose of diminishing damages in an action for libel or slander, of particular facts reflecting upon plaintiff's character or reputation. 130 ALR 854.

Evidence — res ipsa loquitur — negligence of dry cleaner. In *Wilson v. Perkins*, 211 NC 110, 189 SE 179, 130 ALR 1357, it was held that no inference of negligence on the part of a dry cleaner arises upon proof that about a week after a dress was cleaned brown spots had appeared thereon, since the principle of *res ipsa loquitur* does not apply where more than one inference can be drawn from evidence as to the cause of the injury, or where the existence of negligent default is not the more reasonable probability and the proof of the occurrence, without more, leaves the matter resting only in conjecture.

Annotation: Liability of laundry, clothes presser, dyer, or dry cleaner or third person by whom the work is actually done, for loss of or damage to customer's goods. 130 ALR 1359.

Evidence — sufficiency of cause of undulant fever. In *Nelson v. West Coast Dairy Co.* — Wash —, 105 P (2d) 76, 130 ALR 606, it was held that a finding, in an action by one suffering from undulant fever brought against sellers of raw milk alleged to have been infected with the germs of Bang's disease, that the fever was caused by the consumption of such milk, is warranted by the evidence, and is not based on mere speculation or conjecture, where it is shown that undulant fever is the result either of drinking the milk of, or coming in contact with, animals infected with Bang's disease; that the plaintiff, a city dweller, had not come in contact with such animals; that the cattle of the producers from whom the defendants had purchased the milk resold by them to the plaintiff had been infected with Bang's disease; and where, although the defendants adduced other evidence having some tendency to negative the conclusion that the consumption of their milk was the cause of the fever, such as the facts that the plaintiff had occasionally purchased raw milk from other sources and that he sometime ate with friends or at restaurants, this evidence was even more insubstantial and conjectural than the evidence relied on by the plaintiff.

Annotation: Infected or tainted condition of milk or other food, or contamination in water, and its causation of the sickness of the consumer, as inferable from such sickness. 130 ALR 616.

Exemptions — disability insurance satisfying alimony. In *Schlaefter v. Schlaefter*, 71 App DC 350, 112 F (2d) 177, 130 ALR 1014, it was held that disability benefits under an insurance policy are not exempted from sequestration to satisfy a claim for unpaid alimony by a statute providing that such benefits shall not be liable to be

seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any "debt or liability" of the insured.

Annotation: Enforcement of claim for alimony against exemptions. 130 ALR 1028.

Foreign Corporations — noncompliance with conditions — conditional sale. In *Heyl v. Beadel*, 229 Iowa 210, 294 NW 335, 130 ALR 994, it was held that where the only effect attached by statute to the failure of a foreign corporation to procure a permit to do business in the state is to preclude a corporation, or any person claiming thereunder, from maintaining any action in the state upon any contract made by the corporation in the state, a conditional sale contract by such corporation operates to reserve title to the corporation as security for the balance of the purchase price.

Annotation: Foreign corporation's rights in respect of property sold under conditional sale as affected by failure to comply with conditions of doing business in state. 130 ALR 999.

Harboring Criminal — financial assistance. In *U. S. v. Shapiro*, 113 F (2d) 891, 130 ALR 147, it was held that the furnishing of money to a fugitive with a view to enabling him to evade arrest is not a harboring or concealing within a statute making it an offense to harbor and conceal one for whose arrest a warrant is known to have been issued, so as to prevent his discovery and arrest.

Annotation: Charge of harboring or concealing or assisting one charged with crime to avoid arrest, predicated upon financial assistance. 130 ALR 150.

Income Taxes — business extending into other state. In *Re Kansas City Star Co.* — Mo —, 142 SW (2d) 1029, 130 ALR 1168, it was held that fail-

ure of a taxpayer having income from sources outside the state which is not subject to state income tax, to petition the state auditor for permission, which it is within his discretion to grant, to make, for tax purposes, an allocation of income other than according to an elective formula prescribed by the taxing statute, does not make such an allocation inoperative, where returns were successively filed on that basis for each of the tax years in question and for several years theretofore, and no objection was made to the method of allocation, the filing of the returns being an implied request for their approval.

Annotation: State income tax in respect of business that extends into other states. 130 ALR 1183.

Income Taxes — charge-off of bad debt. In *Cammack v. U. S.* 113 F (2d) 547, 130 ALR 205, it was held that where it appears that a taxpayer has made a practice of keeping full and accurate books of account in which are entered all debts due him, and upon which entries of charge-offs are ordinarily made, and which are intended to show all assets and liabilities, his failure to make an entry showing that a bad debt was charged off during the taxable year will ordinarily preclude him from seeking a deduction therefor in determining his taxable income, since his failure would constitute strong, if not conclusive, evidence that the debt had not been charged off.

Annotation: Income tax: what constitutes a sufficient "charge-off" to entitle taxpayer to "bad debt" deduction. 130 ALR 212.

Income Taxes — club exemption. In *West Side Tennis Club v. Com. of Internal Revenue*, 111 F (2d) 6, 130 ALR 103, it was held that a lawn tennis club organized to provide and maintain, for the use of its members, tennis courts and the buildings and

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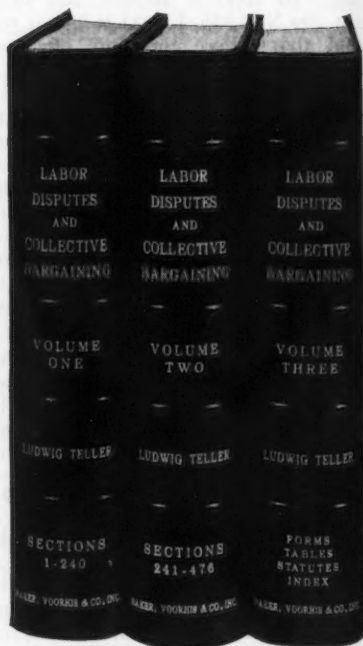
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accommodations pertaining thereto is not entitled to exemption from Federal income tax under a statutory provision exempting "clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder," where it derives from admission fees paid by members of the general public as spectators of tennis tournaments a net operating income of more than one half the gross income derived from the dues and ordinary activities of the club, with the result that members pay smaller dues than they would otherwise have to pay in order to maintain the club.

Annotation: Construction and application of provision of income tax statutes exempting clubs. 130 ALR 107.

Income Taxes — stock dividends. In *Com. of Corporations and Taxation v. Morgan*, — Mass —, 28 NE (2d) 217, 130 ALR 402, it was held that a dividend of shares of "prior preferred stock" to holders of cumulative preferred stock, in payment of accrued unpaid dividends, is within an exception from a state income tax of "stock dividends paid in new stock of the company issuing the same," although the dividend is of a different class of stock from that held by the recipient, and the stockholders thereby acquired an interest in the corporation essentially different from that represented by the preferred stock owned by them, and although the stockholders were not obliged to receive the stock in discharge of the company's obligation to pay the overdue cumulative dividends.

Annotation: Income tax in relation to stock dividends (including character of corporate distributions as stock dividends). 130 ALR 408.

Incompetent Persons — guardian's services rendered without approval of

court. In *O'Mealey v. Grum*, 186 Okla 697, 100 P (2d) 265, 130 ALR 110, it was held that services rendered to an incompetent under a verbal agreement with his guardian, without prior approval by the county court, are a proper charge against the estate of the incompetent when such services are necessary to the proper care and maintenance of the incompetent.

Annotation: Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court. 130 ALR 113.

Insurance — against injury while standing in public thoroughfare. In *Merritt v. Great Northern Life Ins. Co.* — Wis —, 294 NW 26, 130 ALR 1151, it was held that one struck by a passing vehicle while he was standing on the running board of his automobile, which he had driven onto the shoulder of the highway, for the purpose of removing sleet from the windshield, is within the coverage of an insurance policy against injury "by being struck . . . while standing or walking in or on an open public street or highway by any . . . vehicle," where the insurer has indicated its understanding of such provision by printing on the back of the policy the statement that the policy, within the limits imposed, "agrees to pay for your injuries in consequence of your being struck, run down or run over by an automobile on the public streets or highways."

Annotation: Construction and application of specific provision of accident policy as to death or injury while standing in or on public street or highway. 130 ALR 1155.

Insurance — exception in policy against sprinkler leakage damage. In *Industrial Paper & Cordage Co. v. Aetna Ins. Co.* — RI —, 14 A (2d) 657, 16 A (2d) 327, 130 ALR 703, it

was held that a provision in a policy of insurance against direct loss or damage by sprinkler leakage that the insurer shall not be liable for loss or damage caused directly or indirectly by windstorms refers not merely to the loss or damage caused solely by the excepted hazards, but also to the loss or damage by sprinkler leakage brought about by the excepted hazards, and therefore operates to protect the insurer from liability where a chimney, blown down by the wind, in falling so damaged the automatic sprinkler system that quantities of water were discharged therefrom.

Annotation: Construction and application of sprinkler leakage policy, or provisions of that nature in fire policy, as regards hazards or causes of loss. 130 ALR 710.

Intoxicating Liquors — liability of seller for damages. In *Pratt v. Daly*, 55 Ariz 535, 104 P (2d) 147, 130 ALR 341, it was held that while the mere sale of intoxicating liquor to a husband or wife, the consumption of which by the purchaser creates a situation which results in financial injury to the other spouse, does not give rise to an action for damages, such a sale is actionable where, to the seller's knowledge, the purchaser's will power is so impaired that it is not possible for him to refrain from drinking the liquor when it is placed before him.

Annotation: Right of action at common law for damages sustained by plaintiff in consequence of sale of intoxicating liquor or habit-forming drugs to another. 130 ALR 352.

Judgment — attack on divorce decree. In *Haygood v. Haygood*, — Ga —, 9 SE (2d) 834, 130 ALR 87, it was held that a divorce decree granted without jurisdiction in a county other than that of the defendant's residence is subject to direct attack in a later suit in the same court between the same parties to have the decree de-

clared void and of no effect, where the defendant did not participate in any way in the divorce suit.

Annotation: Decree of divorce or separation as subject to attack because suit was brought in wrong county or judicial district. 130 ALR 94.

Landlord and Tenant — liability of owner for injury to tenant. In *Skolnick v. East Boston Sav. Bank*, — Mass —, 29 NE (2d) 585, 130 ALR 1519, it was held that so far as liability for personal injuries to a tenant is concerned, it is immaterial that the lessor has no title to the leased premises except by way of mortgage, having assumed control thereof upon the mortgagor's abandonment of the property.

Annotation: Liability of one exercising the rights of an owner of realty for injuries due to its condition, as affected by want of legal title. 130 ALR 1525.

License — solicitation of alms or contribution. In *Seattle v. Rogers*, — Wash —, 106 P (2d) 598, 130 ALR 1498, it was held that a municipal ordinance imposing a solicitation license fee of \$1,000 and a solicitor's license fee of \$100 for each solicitor, upon the solicitation, for compensation, of donations for charitable purposes, is not, though practically prohibitory, unreasonable or in excess of the police power of the city.

Annotation: Validity of statutes or ordinances requiring license for, or otherwise regulating, solicitation of alms or contributions for charitable, religious, or individual purposes. 130 ALR 1504.

Life Tenants — corporate dividends. In *Re Estate of Boyle*, — Wis —, 294 NW 29, 130 ALR 486, it was held that quarterly cash dividends of \$2 per share regularly declared by a corporation for periods subsequent to the death of the testatrix, in continu-

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ance of the practice and policy of the corporation antedating her death, except that the dividends were reduced from \$3 to \$2 per share, are to be regarded as ordinary dividends and as such allocated to the life beneficiary of a trust rather than as extraordinary dividends apportionable between the life beneficiary and remaindermen, notwithstanding that they were paid in part from surplus that had accumulated before the death of testatrix, they appearing to have been regarded as ordinary dividends and so designated by the directors.

Annotation: Right as between life beneficiaries and remaindermen, or successive life beneficiaries, in corporate dividends or distributions during the life interest. 130 ALR 492.

Mortgage — *purchase by trustee at foreclosure sale for benefit of bondholders.* In *Equitable Trust Co. v. Barlum Realty Co.* 294 Mich 167, 292 NW 691, 130 ALR 1343, it was held that the holder of bonds negotiable in form and containing on their face nothing, other than the statement that they are secured by a certain trust mortgage, to indicate that the holder thereof will be compelled in case of foreclosure to take a pro rata share in real estate held by the trustee is not bound by a provision in the deed of trust securing the bond issue, authorizing the trustee, on request of at least 51 per cent of the holders of the then outstanding bonds secured by the mortgage, to purchase the mortgaged property on foreclosure for the use and benefit of the bondholders.

Annotation: Validity, construction, and application of provision of mortgage or deed of trust authorizing trustee to purchase property at foreclosure sale for benefit of bondholders. 130 ALR 1349.

Payment — *application of right of third person.* In *Farnsworth v. Elec-*

trical Supply Co. 112 F (2d) 150, 113 F (2d) 111, 130 ALR 192, it was held that a materialman who by reason of an exercised right to inspect a subcontractor's books for the purpose of checking the subcontractor's performance of his agreement to pay over to the materialman what he should receive on his subcontract, less payrolls, was aware that payments made by the subcontractor's personal check were of moneys received on the subcontract cannot, as against the principal contractor and the surety on his bond for the payment of materialmen, credit such payments to items of the subcontractor's account which are unrelated to the contract which was the source of the payments.

Annotation: Right of debtor who pays creditor to control application of payments made by latter to his creditor with proceeds of original payment. 130 ALR 198.

Social Security Acts — *exhaustion of administrative remedy before appeal to court.* In *Oklahoma Public Welfare Com. v. State*, — Okla —, 105 P (2d) 547, 130 ALR 873, it was held that where person whose social security assistance had been discontinued on recommendation of county assistance board, and whose application for rehearing and further investigation was refused by said board, failed to pursue the administrative appeal to the Public Welfare Commission required by the Oklahoma Social Security Act, trial court erred in issuing writ of mandamus against the Public Welfare Commission to resume payments. Article 4, Chapter 24, S. L. 1936, §§ 8, 9, 56 Okla. Stat. Anno. §§ 168, 169.

Annotation: Exhaustion of administrative remedies as condition of resort to court in respect of right claimed under social security or old age acts. 130 ALR 882.

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Neither Bench Nor Bar Could Stop Her.
 "Now, madam," said the lawyer for the defense to a little wiry, black-eyed, fidgety woman who had been summoned as a witness in an assault and battery case, "you will please give your testimony in as few words as possible. You know the defendant?"

"Know who?"

"The defendant—Mr. Joshua Bagg?"

"Josh Bagg! I reckon I do know him, and I knowed his father afore him, and I don't know nothing to the credit of either of 'em, and I don't think—"

"We don't want to know what you think, madam. Please say 'yes' or 'no' to my questions."

"Do you know Mr. Joshua Bagg?"

"Don't I know 'im though? You ask Joshua Bagg if he knows me. Ask him if he knows anything about tryin' to cheat a pore widder like me out of a two-year-old cow. Ask—"

"Madam, I—"

"Ask his wife, Betsey Bagg, if she knows anything about slippin' into a neighbor's field and milking three cows on the sly. Ask—"

"Look here, madam—"

"Ask Josh Bagg about that uncle of his who died in jail; ask 'im about lettin' his pore old mother die in the workhouse; ask Betsey about putting a big brick into a lot of butter she sold last autumn—"

"That has nothing to do with the case. I want you to—"

"Then there was old Jimmy Bagg, uncle to Josh, who was chased out of the village for chicken stealing; and Betsey Bagg's brother, who got caught in a neighbor's house at midnight. Ask Josh—"

"Madam, what do you know about this case?"

"I don't know a single thing about it, but I'll bet Josh Bagg is guilty, whatever it is. The fact is I've owed them Baggses a grudge

for the past fifteen years, and I've got myself up as a witness on purpose to get even with 'em, and I feel I've done it. Goodbye."

Damn Good Plea. In the early days of Sioux City the district court was presided over by a judge who, although a man of great ability, was given to rather free indulgence in ardent drinks. He was fond of sports of all kinds, and when a chance to witness a horse race happened to coincide with a sufficient number of drinks the judge's court was apt to be adjourned for the occasion. Once when he was holding court in an outlying part of the district word reached him of an unusually attractive event which was to come off in Sioux City, to see which he would have to start almost immediately. Hastily he announced: "The sheriff will adjourn court sine die."

Now, it chanced that there was a prisoner awaiting trial who had not been able to give bond, and as only two terms were held in a year the prospect of spending six months in jail was not at all pleasing to him. His counsel sprang to his feet and made an eloquent plea in behalf of his client. The judge listened thoughtfully, and after the lawyer was done speaking, fumbled through the docket till he found the case.

"State of Iowa against Bud Jones," he read.

"What's this man charged with?"

The district attorney stated that the charge was burglary.

"Prisoner, stand up," said the judge, "you are charged with the crime of burglary, sir. What's your plea?"

"Not guilty," responded the prisoner.

"What's that?" said the judge, an expression of intense surprise coming over his face.

"Not guilty, your honor," repeated the prisoner.

"Well, that's a damn good plea," said the judge. "Prisoner discharged. Mr. Sheriff, adjourn court sine die."

And his honor lit out for the train.

CASE AND COMMENT

Scratched Out. Some time ago the Commissioners' Court of a South Texas county, heeding the popular demand for more economy in government, passed an order that the sheriff should buy all eggs fed to the prisoners direct from the farmers, that the prisoners should not be allowed any milk or sugar for their coffee, that the telephone should be discontinued in the jail, and that no lights should be allowed.

The day after the Commissioners' Court adjourned, the sheriff confronted the county judge and vehemently informed him that he had other business than looking up farmers and purchasing eggs, that his office could not function if he were informed of crime through the post office instead of by telephone, and that he was not going to lead outlaws through darkness to their cells.

The judge pondered silently for a few minutes. Then without a word he went to the minutes of the Court, scratched out the offending order, and wrote:

"3-12-40 scratched out."

—*Texas Bar Journal*, May 1940.

A Far-seeing Chap. Jones was waiting for a bus when a stranger approached and asked the time. Jones ignored him. The stranger repeated the request. Jones continued to ignore him. When the stranger finally walked away, another waiting passenger said curiously:

"That was a perfectly reasonable question. Why didn't you tell him what time it was?"

"Why?" said Jones. "Listen. I'm standing here minding my own business and this guy wants to know what time it is. So maybe I tell him what time it is. Then what? We get to talking, and this guy says, 'How about a drink?' So we have a drink. Then we have some more drinks. So after a while I say, 'How about coming up to my house for a bite to eat?' So we go up to my house, and we're eating ham and cheese in the kitchen, when my daughter comes in, and my daughter's a very good-looking girl. So she falls for this guy and he falls for her. Then they get married, and any guy that can't afford a watch I don't want him in my family."—*Cosgrove's Magazine*.

Childish Deduction. "Oh, mama, look," cried the tiny youngster on her first visit to the country. "There's a duck! And it walks like it had just got out of a rumble seat."

Patience, a Virtue. Irritated angler: "You've been standing there watching me for three solid hours. Why don't you get a rod and try fishing yourself?"

Onlooker: "I haven't got the patience."

Perfectly Normal. The plaintiff was suing for damages to his wagon and horse as result of being hit by a truck of the defendant company. He also asked for certain damages for injuries and claimed to have been knocked unconscious which latter fact was denied by the truck driver.

A police officer who had investigated the accident was put on the stand by the defendant. Obviously sympathetic to defendant's cause, when asked by defendant's attorney if plaintiff talked coherently immediately after accident, the officer replied: "Why, no, indeed, he did not. He was perfectly normal in every respect."

—Contributed.

Names Is Names. *Cheek v. Eye* (1923) 96 Okla 44, 219 P 883. ("If thine eye offend thee"—sue him.)

An Error of Judgment. Years ago there lived in the old village of St. Charles, in Northern Illinois, a quaint old, grizzly, be-whiskered character, of rotund figure, familiarly known as "Pussy" Clark. For years he presided there as police magistrate, with more than the usual dignity that attends that office. He was exceedingly deaf, yet that infirmity never hindered him in dispatching business. It was his custom to have some friend school him the day before a case was to be heard concerning the facts involved. He then knew the case in a general way, and the next day would look wise, hear nothing and render judgment—a method of judicial procedure sometimes followed by the present-day judiciary. His undoing came one day when the village constable escorted a stranger into "Pussy's" office. The constable made a lengthy statement which "Pussy" heard not, but that in no manner interfered with the machinery of the law, for "Pussy" promptly entered a fine of three dollars and costs against the stranger for being drunk and disorderly. Then there was trouble. But by dint of much shouting his honor was made to understand that the stranger was no culprit, and was present merely to have some papers prepared. The news of "Pussy's" judicial blunder sped rapidly through the village, much to the dis-



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comfiture of his honor, who shortly after resigned his office.—*Exchange.*

Insomniac. Mr. Ginsburg had been complaining of insomnia. "Even counting sheep is no good," he sighed to his partner in the clothing business.

"It's only good if you count up to 10,000," replied Mr. Levy. "Try that tonight."

But the next morning Mr. Ginsburg was still complaining. "I didn't sleep a wink," he said. "I counted the whole 10,000 sheep; I sheared 'em; combed the wool; had it spun into cloth . . . made into suits . . . took 'em to Boston . . . and lost \$21 on the deal! I didn't sleep a wink!"

—*Cosgrove's Magazine.*

I Hear You Calling. It used to be the custom in Paulding County, Georgia, to call witnesses from the courthouse door when court was in session. Judge John W. Underwood was holding court at Dallas one year and told the sheriff to call a certain witness. The sheriff sent a bailiff out to do the calling. It was a new experience for the bailiff and he felt that he might not do it in the proper way. Son Jones, a man with a powerful voice, was standing in front of the courthouse and the bailiff asked him to do the calling. Jones liked the idea and commenced to call the name of the witness in a very loud voice. The Judge, hearing him, looked up and asked, "Mr. Sheriff, does the witness live in this county?"

Contributor: R. E. L. Whitworth,
Dallas, Ga.

Absent-minded. Rufus Choate once endeavored to make a witness give an illustration of absent-mindedness.

"Wal," said the witness cautiously, "I should say that a man who thought he'd left his watch to hum, an' took it out'n his pocket to see if he had time to go hum to get it,—I should say that feller was a leetle absent-minded."

All Broken Up. Ann. H. fell and rolled down a flight of stairs. She brought an action against the landlord for injury alleging defective stairways. The landlord offered settlement in the sum of \$150.00 and medical expenses. Ann's attorney wrote her of the offer. Ann immediately appeared at the attorney's office and said, "\$150.00 and medical expenses! Hugh! I am all broke up. Close the door. I want you to feel of my leg."

Forty-four

The door was closed and Ann straightened her leg, placed her hand on her knee cap and pushed it backward and forward, saying, "See, there is a piece of bone broken loose in my knee and its jumps around."

The attorney said, "Oh, H—, Ann, that is your knee cap. If your knee cap didn't move you couldn't walk. Your leg would be stiff."

Ann reared back, with mouth and eyes wide open, and said, "By G—, I am fifty years old and never knew that before."

Contributor: Joe T. Rogers,
Wichita, Kan.

Editorial Diet. Helen: "You'll never catch me going out to dinner with an editor again."

Mary: "Why? Was he broke?"

Helen: "I don't know whether he was broke or not, but he put a blue pencil through about half of my order."

One learned doc rubbed his proboscis, Looked very wise and said "silicosis." He was most positive from his diagnosis. The other wise doc at an X-Ray squinted, Cleared his throat and T.B. strongly hinted. In words too big to ever be printed. The patient gently murmured, "I plainly see These docs with their learning can't agree On what is the malady that is troubling me." The lawyer, most vigorously shaking his thatch,

Saying, "A pair-o-docs and a swearing match,"

Plunged into his argument with prompt dispatch.

The judge opined, "A problem in materia medica,

Of the kind that gives me a most acute headacha,

Gosh, I wish I was at home in my bedica."

—Francis R. Wiley,
Decatur, Ill.

When Flinches Would Count. The proprietor of a highly successful optical shop was instructing his son, newly entered into the business, on how to go about charging a customer.

"Son," he said, "after you have fitted the customer with glasses, and he asks what the charge will be, you say, 'The charge is \$10.' Then, pause and wait to see if he flinches."

"If the customer doesn't flinch, you then say, 'That's for the frames. The lenses will be another \$10.'"

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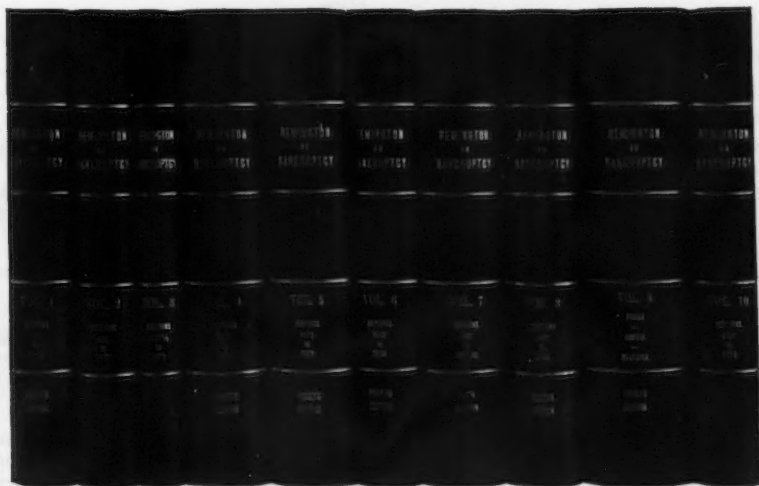
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CASE AND COMMENT

"Then you pause again, this time only slightly, and watch for the flinch."

"If the customer doesn't flinch this time, you say, firmly, 'Each.'"

—*The Open Book.*

Tempora Mutantur, et Nos Mutantur in Illis. A prominent member of the local bar sent the following to the Los Angeles Bar Bulletin: A friend of mine was going through some old legal papers and found a receipt dated 1854 for the sale of a negro woman. I made a copy of the receipt because it was very quaint and I am enclosing it herewith, with the thought that we might put it in the Bar Bulletin with an appropriate note that it was an authentic document.

Gainesville, Jan'y 11, 1854

Rec' of Edward Horace One Thousand Dollars in full payment for a Negro woman named Polly about twenty seven years old sound in mind and as sound in body as Negro women usually are of that age who do not have children, free from all incumbrances and a slave for life.

John M. Soule.

Expediency. "What are they moving the church for?"

"Well, stranger, I'm mayor of these diggin's, an' I'm fer law enforcement. We've got an ordinance what says no saloon shall be nearer than three hundred feet from a church. I give 'em three' days to move the church."

Some Glass Cutter. A claim for personal injuries filed against an estate in a County Surrogate's Court contained this jumbled excerpt:

"He fell backward and his left wrist came in contact with a broken bottle, cutting same."

—M. L. Sheffer,
Rochester, N. Y.

Use Your Imagination. The following letter found in one lawyer's morning mail would tax the mental powers of even the best attorney:

January 20, 1941

Tuckerton, N. J.

Mr. John Jones owes \$52 cash and #43 He wound to build barns has not Build them I give to him. that is or owes all to gether

\$ 52

43

\$ 95.00 Mr. J. J. said he will pay after

Forty-six

New Year, now we have the 20. of Jan. Now I hope he will pay the rent or what orto build barn he owe to pay.

Kindly tent two, and take your commission out of his rent. that is If you wound to tent two or let me Know at once so soon you can.

(Signed) L. F.

—Herman M. Gerber,
Tuckerton, N. J.

What Mischief Afoot. In response to an ad declaring that a certain lawyer had money to lend, the following letter of inquiry was received.

"Dear Sir.

I saw your Ad in the Tama News Herald. I would need a little money to loan. I wonder what your plans are.

I would like to try it out once to see if I like it and if you like it the way I would want it.

I always need a little extra money. I sure would like to try out your plan that is if you are not too strict.

I would try out only \$50 and pay monthly as you wish.

I am a widow and am on the farm with three boys.

Would you be so kind and let me know your plans.

Thank you

(Signed) _____

—Harvey E. Fox,
Tama, Iowa.

Maybe He's Right. Judge: Erastus, do you realize that by leaving your wife, you are a deserter?

Erastus: Judge, if you know'd dat woman like Ah does, you wouldn't call me a deserter; Ah's a refugee.

There Is a Difference. Policeman: "How did you knock this pedestrian down?"

Motorist: "I didn't knock him down. I stopped my car just before reaching him and signaled politely for him to pass. He stared at me sort of incredulously for a moment or two and then fainted."

He Came to Eat. "In small towns," says a New York lawyer whose business keeps him on the road quite a bit, "The general friendliness of the setting is shared by the waiters in the restaurants."

He recently entered a restaurant and was immediately approached by a waiter who observed cheerfully:

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CASE AND COMMENT

"I have deviled kidneys, pigs' feet and calves' brains."

"Have you," coolly asked the lawyer. "Well, what are your troubles to me? I came here to eat."

Peace at Least for a Year. The following agreement between a husband and wife to settle their troubles was brought to an attorney.

"Agreement made by ----- with his wife -----, this 10th day of July, 1940. I hereby agree never to strike or abuse or swear at my wife and to treat her with due respect as my wife and mother of my children. She is at liberty to do as she pleases but to be respectable and decent, otherwise, I hold the right to be divorced and I will support them, my children, to the very best of my ability. I further agree never to become intoxicated and to not drink intoxicating liquor, for the term of one year."

Husband

Wife
J. C. Mabry.
Albia, Iowa.

Not Strange at That. Judge: Mr. State's Attorney, before you can introduce this witness you must show the loss of the record.

State's Attorney: I presumed your honor was aware of the fact that the records of this county were burned.

Judge: As a private citizen I do know the fact, but as the court I do not, and you must put the proof of the fact into your case.

State's Attorney: Well, your honor, it strikes me a little singular that your honor knows something off the bench, and don't know anything on it.

Profane Silence. A well-known judge of the court of sessions was administering the oath to a boy of tender years, and he asked him, "Have you ever taken the oath? Do you know how to swear, my boy?" The simple reply was, "Yes, my Lord; I'm your caddie." This reminds us of the story of the man who aimed a mighty swipe at his ball and knocked the head off his club. There was a long pause while he surveyed the wreckage. "Waal," said an onlooker, "I guess that's the most profane silence I've ever listened to."

When Persistence Paid. In the days of street cars, an aged lawyer who used to ride a street car on a ticket which he maintained was good, but which the company refused to honor, brought suit against them the next day, and the court decided against him. He paid his costs, only a trifle, and the next time got on the car offering the same ticket. It was refused, and again he hailed the company into court.

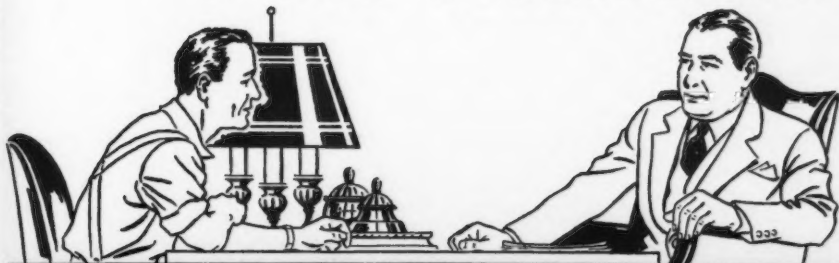
As he was his own lawyer and the ticket was his witness, it was not an expensive course of litigation for him, but it cost the company something. As often as he would be thrown out of court he would offer the ticket again and establish grounds for a new case. At last the tramway company saw a great light. They accepted the ticket one day and let the lawyer ride.

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CITY DOG LICENSE	
PAID	No 225
Office of City Clerk of Yakima, Washington	
THIS IS TO CERTIFY, That <i>J. P. Gankhoff</i>	
has this day paid to the City Clerk TWO DOLLARS, for which said person is hereby granted a	
DOG LICENSE	
for the period of one year from February 1, 1940, to February 1, 1941	
WITNESS My hand seal on this _____ day of _____, 1940	
<i>Pearl Benjamin</i>	
City Clerk	

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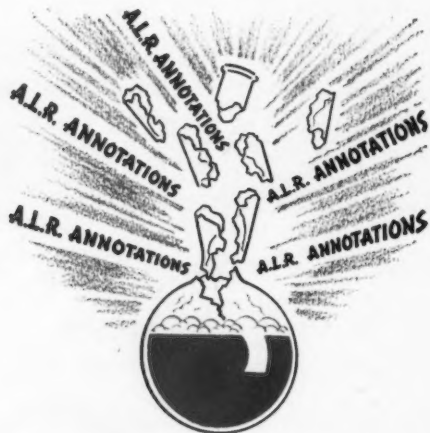
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